

SEALED

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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 UNITED STATES OF AMERICA,

2:13-CR-18 JCM (GWF)

9 Plaintiff(s),

10 v.

11 LEON BENZER, et al.

12 Defendant(s).
13

14 **SEALED ORDER**

15 Presently before the court is defendant Keith Gregory's sealed motion to reconsider (doc. #
16 262 and 263) a sealed order issued by Magistrate Judge George Foley (doc. # 247). The government
17 has not filed a response to this motion.

18 **I. Background**

19 In the instant motion, defendant argues that Magistrate Judge Foley erred in denying his
20 motion to seal. (Doc. # 226). In the underlying motion, defendant argued that the information
21 contained in the government's forthcoming motion, (doc. # 226-1), if made public, would infringe
22 his Sixth Amendment right to a fair trial. (Doc. # 226 at p. 5). Defendant further argued that the
23 qualified right of access to court documents under the First Amendment should not be granted
24 because (1) there is no established right to access inadmissible evidence and (2) the motion would
25 potentially prejudice potential jurors against the defendant and thereby violate his Sixth Amendment
26 protections. (Doc. # 226 at p. 6-7).
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1 The magistrate judge denied defendant's motion, finding that (1) the government's motion
 2 is not so inflammatory as to "prejudice the entire community against [d]efendant" (doc. # 247 at p.
 3 14) and (2) that any potential prejudice may be effectively resolved by other means such as a
 4 thorough voir dire of potential jurors (doc. # 247 at p. 16).

5 **II. Legal Standard**

6 Magistrate judges are authorized to resolve pretrial matters subject to district court review
 7 under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R.
 8 Civ. P. 72(a); D. Nev. R. 3-1(a) ("A district judge may reconsider any pretrial matter referred to a
 9 magistrate judge in a civil or criminal case pursuant to LR IB 1-3, where it has been shown that the
 10 magistrate judge's ruling is clearly erroneous or contrary to law."). "This subsection would also
 11 enable the court to delegate some of the more administrative functions to a magistrate, such as . . .
 12 assistance in the preparation of plans to achieve prompt disposition of cases in the court." *Gomez*
 13 *v. United States*, 490 U.S. 858, 869 (1989).

14 "A finding is clearly erroneous when although there is evidence to support it, the reviewing
 15 body on the entire evidence is left with the definite and firm conviction that a mistake has been
 16 committed." *United States v. Ressam*, 629 F.3d 793, 825 (9th Cir. 2010) (quotation omitted). "An
 17 order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of
 18 procedure." *Global Advanced Metals USA, Inc. v. Kemet Blue Powder Corp.*, 2012 WL 3884939,
 19 at *3 (D. Nev. 2012).

20 A magistrate's pretrial order issued under 28 U.S.C. § 636(b)(1)(A) is not subject to de novo
 21 review, and the reviewing court "may not simply substitute its judgment for that of the deciding
 22 court." *Grimes v. City & County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

23 **III. Discussion**

24 Presently, defendant argues that the government's forthcoming motion—which he sought to
 25 seal—was "actually just a notice" pursuant to Rule 404(b), and that the magistrate judge erred by
 26 considering it as a motion that was subject to the common law right of access. (Doc. # 262 at p. 2-3).
 27 Defendant also argues that the magistrate judge "misapplied the applicable" First Amendment right
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1 of access tests. (Doc. # 262 at p. 5).

2 The first step a court must take when determining whether a document should be sealed
3 despite the common law right of access is to determine if the right of access applies to the document
4 at issue. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). Only two
5 categories of documents have been found to not be covered by the common law right of access:
6 “grand jury transcripts and warrant materials in the midst of a pre-indictment investigation.” *Id.*
7 (internal citations omitted).

8 Once it has been determined the common law right of access applies to the document, there
9 is a “strong presumption in favor of access.” *Id.* (internal quotation omitted). A party who wishes
10 to seal must overcome this presumption by articulating “compelling reasons supported by specific
11 factual findings” which would outweigh the public policy favoring access. *Id.*

12 The court finds that the magistrate judge did not err by finding that the government’s motion
13 was subject to the common law right of access. Even considering the document as a notice rather
14 than a motion, a 404(b) notice is traditionally filed publicly. These documents do not fit into one of
15 the two exceptions that courts have identified. *See Kamakana*, 447 F.3d at 1178.

16 The court also finds the applicable tests were correctly applied when the magistrate found
17 that the document was subject to the First Amendment right of access. The first test—the “experience
18 test”—asks a court to consider whether the document or proceeding has been historically open to the
19 public. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). The second test—the “logic
20 test”—requires a court to consider whether public access plays a significant role in the functioning
21 of the particular process in question. *Id.* The magistrate judge did not err in finding that this type of
22 document was historically open to the public, and that, as with most documents in a criminal
23 proceeding (other than grand jury transcripts and warrant materials), public access plays a significant
24 role in the functioning of the process.

25 The court finds that Magistrate Judge Foley’s decision to deny defendant’s motion to seal
26 was not in error.

27 . . .

1 Accordingly,

2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion for
3 reconsideration, (doc. # 262), be, and the same hereby is, DENIED.

4 IT IS FURTHER ORDERED that defendant's motion for reconsideration, (doc. # 263) is
5 DENIED as duplicative.

6 IT IS FURTHER ORDERED that this order, together with defendant's motion to seal (doc.
7 # 226), the government's response (doc. # 228), defendant's reply (doc. # 231), the magistrate
8 judge's order (doc. # 247), and defendant's motions to reconsider (doc. # 262 and 263), as well as
9 the minutes and recording of the January 14, 2014, motion hearing, shall be unsealed thirty (30) days
10 after the entry of this order unless an appeal to this order is filed. If an appeal is filed, then this order
11 and the foregoing documents shall remain under seal, subject to further order by the Ninth Circuit.

12 DATED July 9, 2014.

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15 UNITED STATES DISTRICT JUDGE
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